IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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POWER INTEGRATIONS, INC., a Delaware corporation,	:	CIVIL ACTION NO.
Plaintiff,	:	
v.	:	
FAIRCHILD SEMICONDUCTOR INTERNATIONAL, INC., a Delaware corporation; FAIRCHILD SEMICONDUCTOR CORPORATION, a Delaware Corporation; and SYSTEM GENERAL CORPORATION, a Taiwanese corporation,	:	
Defendants.	:	08-309 (JJF-LPS)

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Wilmington, Delaware
Thursday, January 22, 2009 at 3:08 p.m.
TELEPHONE CONFERENCE

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BEFORE: HONORABLE **LEONARD P. STARK**, U.S. MAGISTRATE JUDGE

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APPEARANCES:

FISH & RICHARDSON, P.C.
BY: KYLE WAGNER COMPTON, ESQ.

and

FISH & RICHARDSON, P.C.
BY: HOWARD G. POLLACK, ESQ., and
MICHAEL R. HEADLEY, ESQ.
(Redwood City, California)

Counsel for Plaintiff

Brian P. Gaffigan
Registered Merit Reporter

APPEARANCES: (Continued)

ASHBY & GEDDES, P.A.
BY: JOHN G. DAY, ESQ.

and

ORRICK, HERRINGTON & SUTCLIFFE, LLP
BY: G. HOPKINS GUY, III, ESQ., and
BAS de BLANK, ESQ.
(Menlo Park, California)

Counsel for Defendants

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P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held in chambers, beginning at 3:08 p.m.)

THE COURT: Good afternoon, counsel. This is Judge Stark. I have a court reporter here with me so let's start by identifying who is here, please.

MR. COMPTON: Good afternoon, Your Honor. For plaintiff Power Integrations, this is Kyle Wagner Compton from the firm of Fish & Richardson. With me, I also have Howard Pollack and Michael Headley from our Fish & Richardson office in Silicon Valley.

THE COURT: Good afternoon to you, all.

(The attorneys respond, "Good afternoon, Your Honor.")

MR. DAY: Good afternoon, Your Honor. On behalf of Fairchild, as Delaware counsel you have John Day at Ashby & Geddes; and with me on the phone are Hopkins Guy and Bas de Blank from the Menlo Park office of Orrick Herrington & Sutcliffe.

THE COURT: Good afternoon to all of you as well.

MR. GUY: Good afternoon, Your Honor.

THE COURT: For the record, this is our scheduling teleconference in Power Integrations v Fairchild Semiconductor. It's our Civil Action 08-309-JJF-LPS.

I have reviewed the joint proposal regarding scheduling order, and I see there are some significant differences in the parties positions. What I want to do is give you a chance each to weigh in on what you think are the most salient points in the dispute.

So, Mr. Compton, if you or one of your colleagues could begin, that would be great.

MR. POLLACK: Your Honor, this is Howard Pollack on behalf of Power Integrations. I see there is, at least in my mind, three main issues that are disputed that kind of all overlap with one another.

The first issue is to what extent prior discovery between the various parties can be reused from prior litigation because that will certainly affect some of

the other issues, and we set forth our position on that. We believe that certainly a tremendous amount of time and money from the parties as well as resources of the Court can be saved by allowing the parties to make legitimate use of materials that have already been produced and exchanged in various prior litigations. To the extent they are relevant, they should be able to be used in this case. Whether or not they're all relevant or admissible when we get to trial is something that will shake out later. It's not a reason not to have it. For purposes of discovery, it will not need to be redone.

So that's sort of the first main issue I see. That also reflects on the next issue I see which is the scope of discovery in terms of limits on discovery. Fairchild wants much broader leeway to take a much larger number of deposition hours, have substantially more interrogatories, et cetera. We disagree given that we believe a lot of the ground has already been plowed. Obviously, two of the three patents that we're asserting have been litigated before. Therefore, things like the inventors' depos, the prosecution attorney depos, all of that has already been done.

The other issues that are overlapping relate to Power Integrations' licensing history, its sales of the products that use these inventions. Because all of that has

already been done and depositions have already been taken, we don't see the need for the kind of numbers that Fairchild is talking about, and certainly we don't see the need or why either party should be allowed to take the same depositions over again that have already happened. In the prior case, Fairchild deposed our inventors for multiple days each. We just don't think they should be allowed to do that again this time around.

In addition, in the other direction, there is a substantial overlap in terms of products of System General that were the subject of discovery in prior disputes both of the ITC and in the Northern District of California. All of that material can also be reused, we believe, and that would also limit the number of depositions that would need to be taken with regard to those products. So that's the scope of the discovery.

Interrogatories is the same idea. I mean the questions have been asked and answered. Certainly to the extent there is new information, the parties will update that information. It doesn't seem like we need that many new interrogatories to move this case forward.

And that gets to my third main point, which is the schedule. The proposals, at the initial stages, aren't that different. Where they really diverge is when a claim construction hearing should occur and then how the schedule

should progress thereafter.

We strongly believe that the Court should actually enter a schedule that has definitive dates in it for when things happen. We built the schedule that presumes a significant amount of time between the claim construction hearing and expert reports. We expect that the Court will get to the claim construction order as expeditiously as possible, and certainly we hope we would get an order before three months later when we say expert reports are due, but the worry is that we don't want to hold the rest of the case and our trial date hostage to your schedule when it really isn't necessary.

We could do expert reports based on alternative claim construction proposals. We've done it many times, and there is no reason to effectively hold the rest of the case hostage to when you might get to claim construction, although we understand you will get to it as soon as your schedule allows.

The difference in dates for getting to claim construction I think are on the order of about four or five months difference. We think we can get to it substantially quicker than Fairchild partly because, as I said, I think we have a disagreement on how much of the work has already been done before.

And just to remind the Court, the dispute

between the parties is already one that has been ongoing. Obviously, there are new issues, new claims that have been raised, but we want to get this case to trial as expeditiously as possible, and we would expect Fairchild would feel the same way in view of the fact that they have counterclaims that they have asserted against Power Integrations.

Those are the three main issues I wanted to raise. There was one other issue which I thought was relatively minor on the question of a tutorial. They have asked for an in-person tutorial. We've stated our preference for doing it via video. The preference there is that it allows the Court to have it throughout the remainder of the case, and it's easier for the Court to go back and refresh yourself on what the tutorial said, and I think in the long run it's less expensive for the parties to do it that way than to have a live presentation where people have to travel, et cetera.

The other point I would raise with the tutorial, given that it's typically limited in time, is we would suggest there wouldn't be any need to do a tutorial again on the two patents that have been litigated prior. Your Honor actually already has a tutorial on that from a prior case and we don't see any need to sort of redo that again. Of course, we'll address it if Your Honor would like us to. We think it would be better for the Court and better use of the

limited amount of time to focus on the new patent on our side and the new patents obviously on Fairchild's side.

And those are really the issues I thought we should flag or we want to flag for Your Honor.

THE COURT: Okay. Thank you very much for that, Mr. Pollack.

Mr. Day, if you or one of your colleagues could respond, please.

MR. GUY: Your Honor, this is Hopkins Guy. I'm calling in from California and I'll be responding for Fairchild. Let me just go through them in pretty much the same order. I may add a few other things but let me just respond.

With respect to the prior discovery, once we formed the claims, we have no issue with sharing discovery between the two cases. We certainly do not want to repeat prior discovery. Our concern, however, with the protective order is that the prior discovery on these parts and our confidential information will be used in violation of the protective order for other cases, which would be this one.

There is a protection in the protective order to stop that so that confidential information regarding our products and specifications that were produced in the first case are not used as a way for them to go in and mine new claims in this case. So to the extent there is a protection

and we have a date in which they can respond -- I believe we have an April date with respect to infringement contention interrogatories, and we have those formed -- we can certainly share discovery after that date. It's just that we believe it's unfair to produce evidence in one case and then have it being used to trump up evidence or charges in another case.

THE COURT: Okay. Let me stop up there. I'm not sure I follow. Are you saying that if the plaintiff waits until after the exchange of contention interrogatories, then you are in agreement with them?

MR. GUY: Yes, Your Honor. Yes, Your Honor.

THE COURT: Notwithstanding whatever protections are in the protective order in the first case; correct?

MR. GUY: That's correct, as long as they're bound to those contention interrogatories.

THE COURT: Okay. Before you move on then, Mr. Pollack, what would be wrong with what Mr. Guy is proposing?

MR. POLLACK: Well, because, first of all, it kind of puts the normal case, turns it on its head. In any normal case, we'd get discovery before our final contentions were due anyway and, therefore, would be in a position to use all the same materials to establish our contentions that had already been produced. And so to artificially say,

well, no, you can only do contentions based on publicly available information about their products and then after that you can get discovery but you can't change the discovery or supplement them once you have confidential information is kind of backwards from how any of these cases are ever done.

THE COURT: Okay. I understand that point.

Mr. Guy, why don't you respond to that, please.

MR. GUY: Your Honor, the ITC protective order is very clear. It's not to be used for any other case except for the ITC case. And, furthermore, the protective order I believe in the Fairchild/POWI I case similarly is they were not to be used except for purposes of that case.

What we see is that they want all of this discovery that they currently have at their offices, to then be able to mine that for purposes of any additional claims that they want to make against those products using our confidential information, and we think that that is unfair. It's a violation of the protective order. Once we have the claims formed for this case, we're fine to share.

THE COURT: Okay. So then the implication of what you are suggesting, if I'm following, is that I should make you turn over all your documents in this case; if they're repetitive, they're repetitive; and then the plaintiff will do its contention interrogatories. Is that correct?

MR. GUY: If they have done their homework in the Fairchild/POWI II case, this case, and they've made a claim as to certain products, then they can proceed with discovery as to those, independent of anything that was produced in the other case. Once we have their contention interrogatories, based upon their prefiling investigation that was presumably done properly, then we don't mind sharing. But that would be after, certainly after the infringement contention interrogatories, which are due April 20th of this year.

THE COURT: All right. Why don't you move on to the other issues.

MR. GUY: Okay. The second issue was number of depositions, number of interrogatories. This case right now has six patents in it. Our request I believe is for 65 interrogatories and for 150 hours of depositions. In terms of interrogatories, if they have -- if the same answer is still true from the last case, they can give that answer to us again, and it presumably is not a great burden to do so. At 65 interrogatories, it's only about 11 per patent. That certainly seems reasonable.

Furthermore, in the last case, there were a total of -- let me get the numbers out. There were a total of 60 -- I think it was 68 days of depositions -- 69 days of depositions. Fourteen of those days were expert depositions,

and so there were a total of 55 days of fact discovery in that case. At a modest six hours per day, that is well over 300, and actually Power Integration took more days of deposition than Fairchild did.

So we certainly believe with four new patents in this case, 150 hours is actually empirically correct, using the last case as a guide and with four patents. There were four patents in the prior case. So we certainly believe that the 150 hours is reasonable and the number of interrogatories is reasonable.

Hopefully, we won't have to use all of them. That is certainly our goal. As you might imagine, Your Honor, with today's economic climate, none of the clients involved in this case, I'm sure -- and Howard can agree with me or not -- but no one is interested in spending money on depositions that don't need to be taken.

THE COURT: And I think you said earlier you have no interest in making everybody repeat discovery, if that is not necessary.

MR. GUY: That's correct. And to the extent an inventor needs to be taken, I believe there were inventors that were not taken in the last case I believe because of health reasons, but if there is an additional inventor or that we need additional questions related to the additional '270 patent that is asserted for the first time in this

case, we'll ask questions on that. But we certainly are not interested in repeating and asking the same questions. If anything, we will try to avoid that. And I will specifically -- I have done this in many cases. I'll refer a witness back: You testified XY&Z in the prior case, if you recall, let me ask you one or two more questions, and then move on.

THE COURT: Is it possible, though, that you won't need to depose some of the people because you have deposed them previously?

MR. GUY: It's possible, and I'm sure my client will be interested in saving every nickel. So I can't give you a complete discovery plan today of the witnesses we will not ask for, but I can tell you that there will probably be -- we're not going to go through the same list. That's for sure.

THE COURT: Okay. Do you want to move on?

MR. GUY: Yes. Let's see. In terms of schedule, the two key points, Your Honor, I think that need to be made are the fact discovery cutoff. We're about three months different there between an August date proposed by Power Integrations and a November 27th date proposed by Fairchild.

The three months I believe is necessary to complete discovery with regards to six patents. Although

two patents are repeated from Fairchild I, there are at least four new patents in this case. And, again, I remind the Court we had four patents in the last case. And I think it took us between October 2004 and the first trial date was a three-year period, I believe. So there was certainly that amount of discovery.

The second thing is that we are certainly not opposed to assigning a hard date following claim construction but the big issue there and the difference in our schedule with regard to initial expert testimony, expert rebuttal reports, expert discovery and so forth and dispositive motions is that, again, this is a cost-cutting issue for us and trying to keep it lean. If everyone has the claim construction and then can proceed with their expert reports, then the experts do not have to argue in the alternative, and with as many claims as we have and patents, that actually ends up doubling and tripling the work. So by having the claim construction in hand before you begin the expert work, it makes it far more efficient. That's why we framed it that way.

So this can be resolved. I know that we'll be asking for a report and recommendation from Your Honor. Anything in there, that as long as we have the order for claim construction and at least the report and recommendation and can proceed with that in time to get to the first expert

report, that is agreeable with us. But you have control of those dates more so than we do.

So with that, Your Honor, I would --

THE COURT: The tutorial issue. Do you want to address that?

MR. GUY: Sure. The tutorial issue, the reason we like it in person is because we want to make sure the Court has an opportunity to ask questions. And if you just ship off a video, I'm sure we can we make a nice video and the Court can refer back to it. I tend to think that we do a better job when we interact with the Court and are able to answer specifically the questions the Court has in mind and actually focus the tutorial in a direction that the Court may have questions.

THE COURT: Okay. Is there anything else?

MR. GUY: The two other issues that I would like to raise at this point is that, in addition to addressing those that Mr. Pollack raised, is that this case, Fairchild/POWI II as we're calling it, it really has two components. One of them is the holdover. They want to retry as to at least two of the patents, approximately I believe as many as 100 products that were previously tried in Fairchild I. In Fairchild I, they failed to ask for an accounting, and so there is a period of time between the first trial and when Fairchild exited the market with

respect to these in terms of U.S. sales and importation.

So they failed to ask for that accounting, and the judge denied that accounting saying they waived it. It's our view this is now res judicata and claims splitting and under the appropriate law, we don't believe that they can raise that issue. So we would like to present the Court with an early motion to carve that out as quickly as possible, and we believe it's a purely legal issue as to whether they can re-raise and retry the very same claims that they had in the prior case and certainly had an opportunity to but instead waived according to Judge Farnan's order. So we would like to be able to get that on and have the Court's guidance in that in terms of narrowing the case.

The second point is that we certainly appreciate the assignment to the settlement magistrate and we look forward to that. I would like to advise the Court -- I know in our stay motion I believe we raised this but I just want to raise it again -- this is not the first time Power Integrations has filed a lawsuit against System General which is now a Fairchild subsidiary. They actually launched a lawsuit some years ago in I believe it was 2004 as well. And that case was actually dismissed after they went to the ITC and, in large part, it was dismissed because SG is a Chinese company. It sells to Chinese customers and does not do business in the United States.

So we look forward to that. We believe that the same issues will apply here in our initial investigation shows that the U.S. sales and importation are extremely de minimis, certainly less than $100,000 and maybe even less than $20,000.

So I want to give the Court that guidance because certainly Power Integrations already knows this because they dismissed a case. I guess that other case was dismissed May 2008, less than a year ago. And we believe the same result may be here. So we look forward to paring this case down and hopefully avoid the necessity of trying those products.

THE COURT: Let me take you up on your ADR point. Because the parties are not consenting to my jurisdiction here, if there is going to be any mediation, it's going to be in front of me. Is Fairchild interested in me scheduling some type of mediation in the near future?

MR. GUY: Absolutely, Your Honor. I did not know that. I thought we had an order that just came down today in which Judge Farnan had assigned it to Magistrate Judge Thynge.

THE COURT: Okay. Well, that may well be. I'm not aware of that.

MR. GUY: But with all due respect to Your Honor, we look forward to it any way possible, whether it's

you or Judge Thynge. In fact, since you will probably become more familiar with the issues, we would be very interested in scheduling with Your Honor.

THE COURT: Okay. Well, we'll get that straightened out here.

Mr. Pollack, do you want to respond to anything Mr. Guy just spoke to?

MR. POLLACK: Yes, I would. And I will take them in reverse order.

First. With regard to the SG case being dismissed and the reasons therefor, I have to respectfully say that it has nothing to do with what Mr. Guy just insinuated. The case was dismissed in lieu of -- it was dismissed without prejudice in lieu of a stay pending a reexamination. It had nothing to do with the size of the infringement or in fact jurisdiction because the Court in California had already ruled that it had jurisdiction over SG despite its being a foreign entity. So that issue is completely separate. Those patents are completely separate.

We have a ruling from the judge when he granted that dismissal, again, pending the reexam, that if claims were going to be brought on those patents, they be re-brought back in California. So I don't think that that case has anything to do with the dispute we have here on different patents. And so I think that is all I want to say about

that.

With regard to this issue about retrial of issues that were tried before, obviously, Power Integrations doesn't believe it needs to retry "issues that were already the subject of successful jury verdicts" and that therefore collateral estoppel will apply to the parties in this case.

The question of whether or not Power Integrations is entitled to damages for sales that occurred after the trial in Fairchild I and therefore could not have been the subject of a jury verdict is one that we believe we're entitled to pursue in a subsequent action because the infringement, in fact, did not stop. And Your Honor is aware of that. That case is still ongoing. The Court has temporarily stayed the injunction, and it's not yet in effect although it was in effect for a short period of time, but there are several years worth, we believe, of sales of parts that were adjudged to infringe the patent for which damages were not the subject of the trial because in fact it hadn't occurred yet.

We do not believe that the Court's decision on the accounting, which is an equitable remedy, really has anything to do with our legal entitlement to bring a claim for a continuing tort. Obviously, it's a legal issue. It apparently will be the subject of a motion that the Court will have to decide, but we don't understand the legal basis

for the assertion that we're not entitled to maintain those claims here in the subsequent suit given that we could not have tried them in the prior trial.

Mean that's what I will say on that. We will certainly oppose any motion to limit our ability to have those claims adjudicated in this subsequent suit if, and when, Fairchild files one.

THE COURT: Okay. Thank you, both of you, for that.

I'm not going to be able to give you definitive rulings on the phone here. I will need to give a little more thought to some of these issues as I come up with a schedule for you. But I can give you some thoughts on some of what you will see in the order when I issue it.

Specifically, in terms of the schedule, I am going to have hard specific dates in the schedule. And while I can't certainly promise this far in advance, I will certainly do everything I can to get you a claim construction, report and recommendation in time that you hopefully will be able to avoid some of the contingency and arguing in the alternative in your expert reports. So I will do my best, but whether I do what I need to do or not, I am going to have specific dates to make sure this case keeps moving as best it can towards trial, if that is going to be the ultimate resolution of it.

With respect to the tutorial, the tutorial will be in person, but given that Power has prepared video tutorials on at least some of the patents, I'll be giving Power the opportunity, if you wish, to rely on those tutorials in whole or in part with respect to those patents, but you will need to be here in person because I'm at least going to get a tutorial in person from Fairchild.

With respect to the legal issue that was raised. If Fairchild wants to present that in a motion, that would be fine, you know, as soon as you think you are ready to tee that issue up. Obviously, once it's briefed, we'll turn our attention to it.

The other issues I'm going to have to give a little bit more thought to. And as I say, I will get you a scheduling order which will encompass our view on all of those issues.

Anything further at this point, Mr. Pollack?

MR. POLLACK: Nothing from Power Integrations, Your Honor.

THE COURT: Okay. Mr. Guy?

MR. GUY: Nothing further, Your Honor. But, again, Fairchild takes great interest in any way to mediate the case. And the only near term conflict that I have is at the end of April and the beginning of May, I'm before the ITC and have a hearing there. Otherwise, I will make myself

available and will certainly want to push this forward. We are certainly interested in mediating.

THE COURT: Okay. I appreciate that. And I'll make sure, whether it's me or whether it's Judge Thynge, and we'll proceed accordingly. Thank you, all for your time.

(The attorneys respond, "Thank you, Your Honor.")

(Telephone conference ends at 3:38 p.m.)